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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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10 BACILIO RUIZ TORRES and JOSE
11 AMADOR, as individuals and on behalf of
12 all other similarly situated persons,

13 Plaintiffs,

14 v.

15 MERCER CANYONS, INC.,

16 Defendant.
17
18

1:14-cv-03032-SAB

**CLASS CERTIFICATION
ORDER**

19 This case is a good reminder that employers must take care to comply with
20 all applicable employment laws and regulations. Here, the Court examines the
21 interaction between the Agricultural Workers Protection Act ("AWPA") and the
22 H-2A temporary worker program. The AWPA regulates the recruitment and
23 employment of domestic seasonal and migrant agricultural workers. The H-2A
24 program allows domestic employers who meet specific regulatory requirements to
25 bring foreign nationals to the United States to fill temporary agricultural jobs.

26 Mercer Canyons, Inc. hired the Washington Farm Labor Association to help
27 it pursue H-2A workers for the 2013 season. Mercer Canyons was hoping to avoid
28 a possible labor shortage. The Department of Labor approved Mercer Canyons'

1 H-2A application and issued a Clearance Order approving forty-four workers for a
2 period from March 24 to September 1, 2013.

3 Plaintiffs contend that participation in the H-2A program imposes certain
4 obligations on employers to protect domestic workers. These obligations include a
5 positive recruitment period when Mercer Canyons was required to hire any
6 qualified worker who was either referred or walked-in seeking a job¹ and an
7 additional requirement to hire qualified workers up to 50% of the total approved
8 H-2A workforce.² According to Plaintiffs, the H-2A regulations also required
9 Mercer Canyons to contact former employees to solicit their return to the job, and
10 to provide copies of the Clearance Order to any domestic worker that completed
11 any corresponding work. Finally, Plaintiffs contend that Mercer Canyons was
12 required to pay \$12 per hour for all corresponding vineyard related work.

13 Allegedly, Plaintiff Amador sought work in-person at Mercer Canyons on
14 March 19, 2013—during the positive recruitment period. Amador was not told of
15 the available \$12 per hour vineyard jobs. Plaintiff Ruiz was employed by Mercer
16 Canyons in 2013 and performed vineyard work but claims he was never told of the
17 \$12 per hour jobs and was not provided a copy of the Clearance Order.

18 Plaintiffs seek to prove Mercer Canyons had a practice or policy to
19 intentionally withhold information regarding the \$12 per hour jobs from domestic
20 job-seekers and from its own domestic employees. In light of the obligations
21 created by the Clearance Order and H-2A regulations, Plaintiffs believe Mercer
22 Canyons' withholding of such material information constituted false or misleading
23 information, prohibited by § 1821(f) and § 1831(e) of the AWPAA, and by the
24 Washington Consumer Protection Act ("CPA"). The harm Plaintiffs allege under §
25 1821(f) and § 1831(e) is an informational harm and they seek statutory damages
26 pursuant to 29 U.S.C. § 1854(c)(1). Under the CPA, Plaintiffs seek actual

27 ¹ February 4 to March 21, 2013.

28 ² March 21 to June 15, 2013.

1 damages based on the wages earned by foreign H-2A workers and pursuant to
2 RCW 19.86.090.

3 For the underpayment claims under the AWP, § 1322(a) & § 1332(a), and
4 Washington state wage laws, RCW 49.52.050(2), Plaintiffs seek to use accounting
5 records to show the aggregate amount domestic workers were underpaid. Plaintiffs
6 deem this approach necessary due to the confusing method Mercer Canyons
7 tracked work.

8 This matter, Plaintiffs' Motion to Certify Class, ECF No. 51, was heard on
9 March 25, 2015. Plaintiffs were represented by Lori A. Isley and David Solis.
10 Frederick Rivera and Aurora Janke represented Mercer Canyons, Inc.

11 **PROPOSED CLASS**

12 Bacilio Ruiz Torres and Jose Amador represent a putative Inaccurate
13 Information class including:

14 All domestic migrant and seasonal farm workers who: 1) were employed as
15 vineyard workers by Mercer Canyons in 2012; 2) sought employment at Mercer
16 Canyons in 2013 between February 4 and June 15, 2013; or 3) performed vineyard
17 work at Mercer Canyons between March 24 and September 15, 2013, and were not
18 referred by WorkSource.³

19 Plaintiffs also propose a subclass of 2013 workers who performed vineyard
20 work between March 24 and September 15, 2013, were paid less than \$12 per hour
21 and were not referred by WorkSource. This is the putative Equal Pay class.

22 Plaintiffs' claims include misleading information claims under the AWP,
23 29 U.S.C. § 1821(f) & § 1831(e), and the CPA, as well as failure to pay wages due
24

25 ³ WorkSource is a statewide partnership of state, local, and non-profit agencies
26 that serves as a job-training and resource center with a location in Sunnyside.
27 WorkSource also provides job referrals to employers, including for Clearance
28 Order positions. WorkSource had its own obligation to inform the job-seekers it
referred of the material terms and conditions of employment.

1 claims under the AWP, § 1322(a) & § 1332(a), and under Washington state
2 wage laws. RCW 49.52.050(2).

3 STANDARD

4 Rule 23 of the Federal Rules of Civil Procedure governs the certification of
5 a class. Rule 23(a) requires the party seeking certification to demonstrate:

- 6 (1) The class is so numerous that joinder of all members is impracticable;
- 7 (2) There are questions of law or fact common to the class;
- 8 (3) The claims or defenses of the representative parties are typical of the
claims or defenses of the class; and
- 9 (4) The representative parties will fairly and adequately protect the
interests of the class.

10
11 Fed. R. Civ. P. 23(a). Rule 23 is not a mere pleading standard, and the
12 requirements of the rule must be found after a “rigorous analysis.” *Wal-Mart*
13 *Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011).

14 In addition to meeting the requirements of Rule 23(a), a proposed class must
15 also satisfy at least one of the subsections of Rule 23(b). As relevant here, Rule
16 23(b)(3) requires the Court find that common questions of fact or law predominate
17 over any questions that affect only individual members and that class action is
18 better than other methods to efficiently and fairly resolve the controversy.

19 ANALYSIS

20 Ascertainability

21 Rule 23 does not explicitly contain a requirement that a class be
22 ascertainable, however, many courts have found ascertainability to be a
23 prerequisite to class certification. *See Carrera v. Bayer Corp.*, 727 F.3d 300 (3rd
24 Cir. 2013); *Astiana v. Ben & Jerry’s Homemade, Inc.*, 2014 WL 60097 (N.D. Cal.
25 2014); *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567. The proposed class should be
26 definite and ascertainable from objective criteria so that the Court can determine
27 whether a particular individual is a class member or not. *Bayer Corp.*, 727 F.3d at
28 306; *In re Hulu Privacy Litig.*, 2014 WL 2758598 at *13 (N.D. Cal. 2014).

1 Although the criteria for membership in the class must be determined, not all class
2 members need to be ascertained prior to certification. *Jones v. ConAgra Foods,*
3 *Inc.*, 2014 WL 2702726 at *8 (N.D. Cal. 2014).

4 The proposed class and subclass are sufficiently ascertainable. The
5 Inaccurate Information class consists of all domestic migrant and seasonal farm
6 workers who were employed as vineyard workers by Mercer Canyons in 2012,
7 sought employment at Mercer Canyons in 2013 between February 4 and June 15,
8 2013, or performed vineyard work at Mercer Canyons between March 24 and
9 September 15, 2013, and were not referred by WorkSource. This class can be
10 determined through employment documents from Mercer Canyons and from the
11 contractor, M & L. The Equal Pay subclass consists of all domestic migrant and
12 seasonal farm workers who performed vineyard work at Mercer Canyons between
13 March 24 and September 15, 2013, were not paid \$12 per hour, and were not
14 referred by WorkSource. This subclass can also be ascertained by Mercer Canyons
15 payroll records. Accordingly, both the Inaccurate Information class and the Equal
16 Pay subclass are sufficiently ascertainable.⁴

17 23(a)(1) Numerosity

18 Rule 23(a)(1) requires a proposed class be so numerous that joinder of all
19 members is impracticable. Impracticability depends on “the facts and
20 circumstances of each case and does not, as a matter of law, require any specific
21 minimum number of class members.” *Smith v. Univ. of Wash. Law Sch.*, 2
22 F.Supp.2d 1324, 1340 (W.D. Wash. 1998). Mercer Canyons appears to concede
23 that the putative class is sufficiently numerous to satisfy Rule 23(a)(1). The Court
24

25 ⁴ Mercer Canyons suggests the Equal Pay class is an impermissible “Fail-Safe”
26 class. The Court is convinced that the Equal Pay class, at least as defined by the
27 Plaintiffs in their reply, ECF No. 116 at 9, is not a fail-safe class because the
28 proposed class definition is not framed as a legal conclusion and the definition
does not preclude the possibility of an adverse judgment against the class
members.

1 agrees. The putative class consists of more than 600 identified individuals and the
2 subclass more than 200. Here, Rule 23(a)(1) is satisfied based on the size of the
3 proposed class alone. *See Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th
4 Cir. 1982) (finding a class as small as thirty-nine members sufficiently numerous
5 based on size alone).

6 23(a)(2) Commonality

7 Rule 23(a)(2) requires there be questions of law or fact common to the class
8 for a proposed class to be certified. At least one common question of “shared legal
9 issues with divergent factual predicates or a common core of salient facts coupled
10 with disparate legal remedies” must exist. *Jimenez v. Allstate Ins. Co.*, 765 F.3d
11 1161, 1165 (9th Cir. 2014) (internal citation omitted). A class meets the
12 commonality requirement when “class members’ situations share a common issue
13 of law or fact, and are sufficiently parallel to insure a vigorous and full
14 presentation of all claims for relief.” *Wolin v. Jaguar Land Rover N. Am., LLC.*,
15 617 F.3d 1168, 1172 (9th Cir. 2010). Whether the questions are likely to drive the
16 resolution depends on the nature of the claim on the merits.

17 Plaintiffs argue the common question as to the inaccurate information class
18 is whether Mercer had a consistent practice of failing to tell domestic workers it
19 had \$12 per hour work available. Plaintiffs believe this common question goes to
20 both AWPAs and Washington CPA issues. As to the equal pay subclass, Plaintiffs
21 suggest a question of whether certain types of work was covered by the Clearance
22 Order and whether Mercer had a practice of willfully withholding wages by failing
23 to pay \$12 for that work.

24 Mercer Canyons argues there are no common questions because each class
25 member will need to show specific and individualized facts as to how he or she
26 was provided misleading information. Mercer Canyons argues it was under no
27 affirmative obligation, either from the AWPAs or H-2A regulations, to inform job-
28 seekers of the available work, and therefore, any attempt to show Mercer Canyons

1 had a pattern or policy to withhold such information is not sufficient to establish
2 liability as to each class member.

3 Whether Mercer Canyons had a policy or practice to withhold information
4 pertaining to H-2A jobs from job-seekers and current employees, and if so,
5 whether such withholding constituted providing false or misleading information
6 concerning the existence of, or terms and conditions of, jobs constitute common
7 questions shared by proposed class members regarding the inaccurate information
8 claims under the AWP and CPA. In other words, Plaintiffs may seek to
9 demonstrate that Mercer Canyons had an obligation to provide information but
10 instead had a policy to purposely avoid that obligation, and Plaintiffs may argue to
11 the jury that the blanket policy of withholding this information from those who
12 sought work was false or misleading.

13 In *Jimenez v. Allstate Ins. Co.*, the Ninth Circuit upheld class certification
14 based on commonality involving whether “class members *generally* worked
15 overtime without receiving compensation as a result of Defendant’s *unofficial*
16 *policy* of discouraging reporting such overtime.” 765 F. 3d 1161, 1164 (9th Cir.
17 2014) (emphasis added); *see also Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir.
18 2014) (finding questions of statewide prison policy constituted requisite
19 commonality for class of prisoners making Eighth Amendment claims). Here,
20 Plaintiffs similarly seek to establish that Defendant’s policy or practice raises the
21 common question of whether Mercer Canyons provided false or misleading
22 information to the class. Just as in *Jimenez*, “proving at trial whether such informal
23 or unofficial policies existed will drive the resolution” of that claim. *Id.* at 1166.

24 As to the underpayment claims, Plaintiffs offer as a common question
25 whether Mercer Canyons had a practice to consistently fail to pay employees \$12
26 for corresponding Clearance Order work. Plaintiffs suggest they will offer proof of
27 underpayment in the aggregate. Because Plaintiffs seek to prove this claim in the
28 aggregate, the questions involved are necessarily common. This common question

1 will drive the resolution of both the AWPAs and Washington law underpayment
2 claims. The proposed class and subclass present common questions of fact or law
3 in satisfaction of Rule 23(a)(2).

4 23(a)(3) Typicality

5 Rule 23(a)(3) requires the representative parties have claims or defenses
6 that are typical of the claims or defenses of the class. This rule is permissive and
7 claims are “typical if they are reasonably co-extensive with those of absent class
8 members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150
9 F.3d 1011, 1020 (9th Cir. 1998). The test is “whether other members have the
10 same or similar injury, whether the action is based on conduct which is not unique
11 to the named plaintiffs, and whether other class members have been injured by the
12 same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th
13 Cir. 1992). Typicality concerns the nature of the claim “of the class representative,
14 and not to the specific facts from which it arose or the relief sought.” *Id.* Typicality
15 and commonality requirements are often overlapping. *Wal-Mart*, 131 S.Ct. at 2551
16 n.5 (2011).

17 Plaintiffs argue that typicality is met because representative Plaintiffs’
18 claims arise from the same practice or course of conduct as those of the class
19 members. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011).
20 According to Plaintiffs, Amador’s inaccurate information claim arises from the
21 same course of conduct as the claims of other class members—namely, the policy
22 of withholding material information regarding H-2A work. Additionally, Plaintiffs
23 allege Ruiz’s equal pay claims also arise from Mercer Canyons’ course of conduct
24 that was not unique to him—regularly underpaying workers for corresponding
25 work.

26 Defendants argue that Plaintiffs do not show the named representatives are
27 typical of all class members. Specifically, Mercer Canyons argues that Ruiz’s
28 claims are not typical of former employees, who Mercer Canyon would have been

1 obligated to inform of H-2A work, and also are not typical of M&L employees
2 who were brought in by a contractor for Mercer Canyons.

3 The Ninth Circuit is clear that when a policy or practice is at issue that
4 affects all class members, typicality exists. *See Parsons*, 754 F.3d at 685;
5 *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). The policy Plaintiffs allege
6 Mercer Canyons implemented would affect current and former employees alike, as
7 well as job-seekers.

8 The issue concerning the M&L employees may present additional questions
9 but it does not defeat typicality. Mercer Canyons claims there would be a
10 threshold question of whether M&L and Mercer Canyons are joint employees.
11 Presumably this threshold question would apply to numerous putative class
12 members. Mercer Canyons does not present any law or argument as to how this
13 threshold question defeats typicality, so the argument must be inferred. A
14 declaration by M&L's owner states he was never told about the H-2A application,
15 H-2A positions, or any requirements to pay \$12 per hour. Ostensibly, the same
16 alleged policy or practice of withholding or providing misleading information
17 about the \$12 per hour jobs would affect M&L and its employees in the same way
18 it affects Amador or Ruiz. The inaccurate information provision in the AWPAs also
19 applies to farm labor contractors. 29 U.S.C. § 1831(e). The Plaintiffs may argue
20 Mercer Canyons provided misleading information to M&L, coupled with a
21 causation theory, or could argue a joint employer theory. Regardless, typicality
22 "refers to the nature of the claim . . . and not to the specific facts" and the nature of
23 the claim would appear to be the same even if one additional question would need
24 to be answered. *See Hanon*, 976 F.2d at 508. The Court is satisfied the class
25 representatives meet the typicality requirement of Rule 23.

26 23(a)(4) Adequacy

27 Rule 23(a)(4) requires that class representatives can adequately represent
28 the proposed class. The test for adequacy is "(1) do the named plaintiffs and their

1 counsel have any conflicts of interest with other class members and (2) will the
2 named plaintiffs and their counsel prosecute the action vigorously on behalf of the
3 entire class.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)
4 (citing *Hanlon*, 150 F.3d at 1020). Mercer Canyons makes no argument regarding
5 this prerequisite and Plaintiffs’ attorneys state there is no evidence of any
6 conflicts, that the attorneys are qualified and experienced, and that the named
7 plaintiffs are prepared to properly think and act on behalf of the entire class.
8 Accordingly, the Court finds the adequacy requirement from Rule 23(a)(4) is met.

9
10 23(b) Predominance

11 The class must also satisfy one subsection of Rule 23(b) to be certified. Rule
12 23(b)(3) states a class may be maintained if:

13 [T]he court finds that the questions of law or fact common to class
14 members predominate over any questions affecting only individual
15 members, and that a class action is superior to other available
16 methods for fairly and efficiently adjudicating the controversy. The
17 matters pertinent to these findings include:

18 (A) the class members' interests in individually controlling the
19 prosecution or defense of separate actions;

20 (B) the extent and nature of any litigation concerning the
21 controversy already begun by or against class members;

22 (C) the desirability or undesirability of concentrating the
23 litigation of the claims in the particular forum; and

24 (D) the likely difficulties in managing a class action.

25 The predominance element of 23(b)(3) overlaps with 23(a)(2) commonality
26 questions, however, the predominance consideration is more demanding, and is
27 particularly concerned with whether the putative class is sufficiently cohesive to
28 justify the class vehicle. *Wolin*, 617 F.3d at 1172. Rule 23(b)(3) concerns the
relationship between the common and individual issues and asks if common
questions present a significant aspect of the case that can be resolved in a single
adjudication rather than on an individual basis. *Hanlon*, 150 F.3d at 1022.

1 Here, the common questions predominate over any individual questions as
2 they represent the crux of the liability argument. As to the AWPAs inaccurate
3 information claim, the common question of whether Mercer Canyons had a
4 practice or policy to mislead domestic workers about available jobs could possibly
5 satisfy every element of the § 1831(e) claim.

6 The CPA claim involves five elements:

- 7 1) an unfair or deceptive act or practice;
- 8 2) which occurs in trade or commerce;
- 9 3) that impacts the public interest;
- 4) which causes injury to the plaintiff; and
- 5) the injury is causally linked to the unfair or deceptive act.

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11 *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299,
12 312 (1993). By its own terms, the CPA is particularly well-suited to resolution by
13 common questions. In proving the common questions, Plaintiffs could satisfy the
14 first three elements of a CPA claim.

15 Mercer Canyons argues that several individual questions are present that
16 defeat predominance. However, these questions nearly all go to the issue of
17 damages rather than liability. Individual issues that may result in different damage
18 findings do not defeat certification. *See Leyva v. Medline Industries Inc.*, 716 F.3d
19 510, 513-14 (9th Cir. 2013); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d
20 1087, 1094 (9th Cir. 2010). While there may be some individual questions that go
21 to liability, the question of whether Mercer Canyons had a policy to provide
22 misleading information to job-seekers predominates over the exact interaction
23 between individual job-seekers and Mercer Canyons.

24 Similarly, common questions involving the underpayment claims
25 predominate over any individual questions. Because Plaintiffs seek to prove the
26 underpayment claims aggregately, individual questions pertaining to liability will
27 not exist. Mercer Canyons insists that individual proof would be necessary for
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1 each class member, but any individual questions will likely only exist for any
2 damages determinations.

3 The Court also finds a class action is superior to other methods for resolving
4 the controversy. First, there is no reason to believe that any class members would
5 seek to pursue individual actions against Mercer Canyons. The cost of pursuing
6 the claims individually could outweigh any potential recovery. Second, there is no
7 other known litigation concerning proposed class members and the defendant
8 concerning the same subject matter. Third, the Eastern District of Washington is
9 an appropriate and convenient forum, as most or all of the events in question
10 occurred within the district. Lastly, there do not appear to be any other major
11 impediments in managing this particular matter as a class action.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. Plaintiffs' Motion for Class Certification, ECF No. 51, is **GRANTED** as
14 to the inaccurate information claims under the AWP, 29 U.S.C. §
15 1821(f) & § 1831(e), and the CPA, and to failure to pay wages due
16 claims under the AWP, 29 U.S.C. § 1322(a) & § 1332(a), and under
17 Washington state wage laws. RCW 49.52.050(2).

18 2. The Court certifies the following class pursuant to Rule 23(b)(3) and
19 Rule 23(c):

20 All domestic migrant and seasonal farm workers who: 1) were
21 employed as vineyard workers by Mercer Canyons in 2012; 2)
22 sought employment at Mercer Canyons in 2013 between
23 February 4 and June 15, 2013; or 3) performed vineyard work
24 at Mercer Canyons between March 24 and September 15, 2013,
25 and were not referred by WorkSource.

26 3. The Court certifies the following subclass pursuant to Rule 23(b)(3) and
27 Rule 23(c)(5):
28

1 All domestic and seasonal farm workers who performed
2 vineyard work between March 24 and September 15, 2013 for
3 Mercer Canyons, were paid less than \$12 per hour, and were
4 not referred by WorkSource.

- 5 4. The Court appoints Lori Isley, Joachim Morrison, and David Solis
6 of Columbia Legal Services and Adam Berger, and Martin
7 Garfinkle of Schroeter Goldmark & Bender as class counsel
8 pursuant to Rule 23(g).
- 9 5. The Court designates named Plaintiffs Bacilio Ruiz Torres and
10 Jose Amador as class representatives.
- 11 6. Within ten days from the date of this Order, class counsel shall
12 serve and file a proposed Notice to members of the certified class.
13 This Notice shall comply with Rule 23(c)(2)(B).
- 14 7. Defendant shall have ten days from service of the proposed Notice
15 to serve and file any objections to the proposed Notice.
- 16 8. Class counsel shall serve and file a reply, if any, within five days
17 from service of any objections to the proposed Notice.

18 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
19 enter this Order and provide copies to counsel.

20 **DATED** this 8th day of April 2015.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

26 Stanley A. Bastian
27 United States District Judge
28